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TATUNG COMPANY OF AMERICA, INC.

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA

10 SAN FRANCISCO DIVISION

11 IN RE: TFT-LCD (FLAT PANEL)  
12 ANTITRUST LITIGATION

13 This Document Relates To:  
14 ALL DIRECT PURCHASER ACTIONS

Case No. M:07-1827 SI  
MDL No. 1827

**MOTION FOR LEAVE TO FILE  
MOTION TO RECONSIDER MARCH  
3, 2009, ORDER DENYING MOTION  
TO DISMISS OR, IN THE  
ALTERNATIVE, TO VACATE  
ORDER AND TO ALLOW ORAL  
ARGUMENT**

Dept: 10  
Before the Honorable Susan Illston

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**NOTICE OF MOTION AND MOTION**

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, Defendant Tatung Company of America ("TUS") hereby moves the Court for an order granting TUS leave to file a motion to reconsider the Court's March 3, 2009, Order (Dkt #873) denying TUS's Motion to Dismiss Plaintiffs' First Amended Consolidated Complaint (Dkt #856), or, in the alternative, to vacate the March 3, 2009, Order and set TUS's motion for oral argument.

This Motion is based upon this Notice, the Memorandum of Law in support thereof, and such other materials and information that the Court may properly consider at or before the hearing on this Motion.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant Tatung Company of America, Inc. ("TUS") brings this motion based on (1)  
 3 plaintiffs' recent admission on December 30, 2009, that Defendant Chunghwa Picture Tubes, Ltd.  
 4 ("CPT") is not a vertically-integrated single entity (Dkt. #1440), (2) case law decided after this  
 5 Court's March 3, 2009, Order denying TUS's motion to dismiss, (3) the Court's failure to address  
 6 arguments and case law in TUS's motion to dismiss, and (4) the Court's failure to provide TUS the  
 7 opportunity for oral argument on its motion to dismiss, as all other defendants had.  
 8

9 As the first ground for reconsideration, plaintiffs recently admitted the very issue that they  
 10 have been contesting with TUS – when plaintiffs admitted that CPT is not a vertically-integrated  
 11 single entity. Plaintiffs' Motion for Preliminary Approval, Dkt. #1440. Plaintiffs made this  
 12 admission in their motion for preliminary approval of the class action settlement with CPT: "Unlike  
 13 some of the other defendants in this case, Chunghwa is not a vertically-integrated single entity, and  
 14 does not sell finished products itself directly in the United States." (Pls. Motion for Prelim. App., p.  
 15 7, Dkt. #1440). As seen below, plaintiffs' admission is the death knell for their arguments based on  
 16 *Royal Printing*. Since that case clearly no longer applies to CPT and TUS in light of plaintiffs'  
 17 admission, plaintiffs' claim against TUS should be dismissed.  
 18

19 Moreover, after this Court's March 3, 2009, Order, Judge Hamilton issued a decision which  
 20 clarified the standard that district courts should apply to a Rule 12(b)(1) motion under the Ninth  
 21 Circuit's decision in *Thornhill Publ'n Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730 (9th Cir.  
 22 1979). *See Sun Microsystems, Inc. v. Hynix Semiconductor, Inc.*, 608 F. Supp. 2d 1166 (N.D. Cal.  
 23 2009). Under the proper standard as clarified by Judge Hamilton, this Court should not have denied  
 24 TUS's motion because of purported factual issues, and instead should have granted TUS's motion to  
 25 dismiss.  
 26  
 27  
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1 Finally, on March 3, 2009, the Court entered an order denying TUS's motion to dismiss  
 2 without oral argument. (Dkt #873). However, when TUS and plaintiffs were before the Court on  
 3 February 27, 2009, when TUS's motion was originally set for oral argument, the Court had indicated  
 4 that it was not prepared to address TUS's motion and then set the motion for oral argument on  
 5 March 6, 2009. In addition, TUS's counsel had indicated that oral argument was necessary because  
 6 plaintiffs had filed a supplemental submission to which TUS had not had an opportunity to respond  
 7 and that TUS's only opportunity to do so would be at oral argument.<sup>1</sup> Finally, all of the other  
 8 defendants and plaintiffs had an opportunity on February 27 to give oral argument on numerous  
 9 motions to dismiss.  
 10

11 There are several significant arguments in response to plaintiffs' supplemental submission  
 12 that are important for the Court to consider – most notably that plaintiffs' assertion of control must  
 13 fail because the family that they contend controls TUS does not even control Tatung Company of  
 14 Taiwan ("Tatung Taiwan"), much less CPT. In addition, the control exception in *Illinois Brick* and  
 15 the Ninth Circuit's decision in *Royal Printing* do not set forth an affirmative rule of liability that can  
 16 be applied against TUS to keep it in this case. For these and other reasons, TUS respectfully asks  
 17 the Court to grant TUS leave to file a motion to vacate the denial of its motion to dismiss and to set  
 18 the motion for oral argument.  
 19  
 20

## 21 I. STATEMENT OF THE ISSUES

22 1. Whether, under Civil Local Rule 7-9, the plaintiffs' recent admission that CPT is not  
 23 a vertically integrated single entity mandates dismissal of TUS because *Royal Printing* no longer  
 24 applies.  
 25

26 2. Whether, under Civil Local Rule 7-9, the Court's failure to apply the indirect  
 27

28 <sup>1</sup> The Court did indicate that it would tentatively set TUS's motion for oral argument and would look at the motion to determine whether oral argument was necessary.

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1 purchaser rule as a bar to claims instead of an affirmative theory of liability was a “manifest failure  
2 by the Court to consider material facts or dispositive legal arguments which were presented to the  
3 Court.”

4 3. Whether, under Civil Local Rule 7-9, the Court’s failure to address and apply the  
5 cases cited by TUS for the proposition that the stray marketing statements that plaintiffs rely on are  
6 insufficient as a matter of law was a “manifest failure by the Court to consider material facts or  
7 dispositive legal arguments which were presented to the Court.”

9 4. Whether, under Civil Local Rule 7-9, based on the new case law in *Sun*  
10 *Microsystems, Inc. v. Hynix Semiconductor, Inc.*, 608 F. Supp. 2d 1166 (N.D. Cal. 2009), this Court  
11 erred in denying TUS’s Rule 12(b)(1) motion to dismiss due to supposed factual issues.

12 5. Whether the Court should grant TUS’s motion for leave to file a motion to vacate the  
13 Court’s March 3, 2009, Order Denying TUS’s Motion to Dismiss Plaintiffs’ First Amended  
14 Consolidated Complaint, and set the Motion for oral argument, or, in the alternative for  
15 reconsideration of the March 3, 2009, Order.  
16

## 17 **II. STANDARD APPLIED TO CIVIL LOCAL RULE 7-9 MOTIONS**

18 This Court determines motions for leave to file a motion for reconsideration under Civil  
19 Local Rule 7-9. Under Civil Local Rule 7-9(b), before leave to file a motion for reconsideration is  
20 granted, the moving party must specifically show: (1) that at the time of the motion for leave, a  
21 material difference in fact or law exists from that which was presented to the Court before entry of  
22 the interlocutory order for which reconsideration is sought. The party also must show that in the  
23 exercise of reasonable diligence the party applying for reconsideration did not know such fact or law  
24 at the time of the interlocutory order; or (2) The emergence of new material facts or a change of law  
25 occurring after the time of such order; or (3) A manifest failure by the Court to consider material  
26 facts or dispositive legal arguments which were presented to the Court before such interlocutory  
27  
28

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order. *Whittlestone, Inc. v. Handi-Craft Co.*, 2009 U.S. Dist. LEXIS 15102, \*3-4 (N.D. Cal. Feb. 11, 2009); *Palmer v. Stassinis*, 2005 U.S. Dist. LEXIS 41271 (N.D. Cal. June 24, 2005).

### III. ARGUMENT

#### A. The Court Should Grant TUS Leave to File a Motion for the Court to Reconsider Its Denial of TUS's Motion to Dismiss and to Grant the Motion.

The Court should grant TUS leave to file a motion for the Court to reconsider its denial of TUS's motion to dismiss and to grant the motion, for several reasons. First, new factual material, in the form of plaintiffs' recent admission that CPT is not a vertically integrated single entity, justifies reconsideration of the application of this Court's March 3, 2009, and the application of *Royal Printing* to plaintiffs' claim against TUS. Second, the new case law in *Sun Microsystems, Inc. v. Hynix Semiconductor, Inc.*, 608 F. Supp. 2d 1166 (N.D. Cal. 2009), which clarified the standard that district courts should apply to a Rule 12(b)(1) motion under the Ninth Circuit's decision in *Thornhill Publ'n Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730 (9th Cir. 1979), justifies reconsideration of this Court's ruling that TUS's motion to dismiss had to be denied in light of supposed factual issues. Finally, reconsideration is warranted because this Court manifestly failed to consider material facts and dispositive legal arguments presented to the Court when it (i) failed to apply the indirect purchaser rule as a bar to claims instead of an affirmative theory of liability; and (ii) failed to address and apply the cases cited by TUS for the proposition that the stray marketing statements that plaintiffs rely on are insufficient as a matter of law.

#### 1. Plaintiffs' Recent Admission that CPT Is Not a Vertically Integrated Single Entity Is the Death Knell for Its Claim Against TUS.

As stated above, plaintiffs' admission that CPT is not a vertically integrated single entity is the death knell for their claim against TUS. Indeed, whether CPT and TUS were vertically integrated as a single entity was plaintiffs' central argument and contention in opposing TUS's

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1 motion to dismiss and the application of the indirect purchaser rule under *Illinois Brick*. Finally,  
 2 plaintiffs' contention that CPT and TUS were vertically integrated and a single entity was the basis  
 3 for this Court's holding that there were factual issues regarding the possible application of *Royal*  
 4 *Printing*, which plaintiffs' recent admission renders inapplicable. For the above reasons, plaintiffs'  
 5 claim against TUS should be dismissed or, at the very least, this Court should reconsider its Order  
 6 denying TUS's motion to dismiss.  
 7

8 First, as this Court noted in its March 3, 2009, Order, plaintiffs' central argument and  
 9 contention opposing TUS's motion to dismiss and the application of the indirect purchaser rule was  
 10 that CPT and TUS were vertically integrated and a single entity. Thus, this Court noted: "In  
 11 response, plaintiffs argue that TUS and defendant Chunghwa Picture Tubes, Ltd. ('CPT') are  
 12 considered a single entity for purposes of the antitrust laws ...." (March 3, 2009, Order, p. 2, Dkt.  
 13 #873.) *See also* Plaintiffs' Opposition to Tatung Company of America, Inc.'s Motion to Dismiss, p.  
 14 1, Dkt. #804 (noting that "Chunghwa and Tatung America are considered a single entity for  
 15 purposes of the antitrust laws..." and referring to "the economic reality of Tatung-Chunghwa's  
 16 status as a single entity under the antitrust laws"). Plaintiffs' admission now that CPT is not a  
 17 vertically integrated single entity flatly contradicts their prior position.<sup>2</sup> Based on plaintiffs'  
 18 admission now, this Court should reconsider its March 3, 2009, Order, hold that the indirect  
 19 purchaser rule applies to bar plaintiffs' claim against TUS, and dismiss that claim. *See, e.g., Godwin*  
 20 *v. Nat'l Union Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 10906 (M.D. Ala. 2008) (granting motion to  
 21 reconsider denial of summary judgment based on plaintiffs' subsequent judicial admission).  
 22  
 23

24 Second, the application of *Royal Printing* to plaintiffs' claim against TUS and the supposed  
 25 factual issues relating to the application of *Royal Printing* were the key to this Court's denial of  
 26 TUS's motion to dismiss. See March 3, 2009, Order, pp. 2-3, Dkt. #873. However, plaintiffs'  
 27

28 <sup>2</sup> Plaintiffs' admission now that CPT is not a vertically integrated single entity, when combined with their  
 prior insistence to the contrary, borders on subterfuge, as well as sanctionable conduct.

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admission now that CPT is not a vertically integrated single entity renders *Royal Printing* inapplicable, by plaintiffs' own admission, to their claim against TUS. Indeed, plaintiffs' admission that CPT was not a vertically integrated single entity effectively ends the issue, which removes the supposed factual issues on which this Court denied TUS's motion to dismiss. *See, e.g., American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) ("Judicial admissions...have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact."). Therefore, this Court should reconsider its denial of TUS's motion to dismiss and should grant TUS's motion.

**2. Neither the Control Exception to *Illinois Brick* Nor *Royal Printing* Constitutes the Basis for a Claim Against TUS.**

The Court failed to apply the indirect purchaser rule as a bar, instead of an affirmative theory of liability, entitling plaintiffs to relief. Plaintiffs cannot state a claim against TUS under the control exception to *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), or under *Royal Printing v. Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980), because neither represents an affirmative theory of liability against middleman TUS. Instead, the control exception to *Illinois Brick* and the decision in *Royal Printing* merely provide that the purchasers from TUS can bring an action against the manufacturer(s) of LCD panels for the purchases that they made from TUS. Absent any allegations that TUS knew of and participated in the alleged conspiracy, plaintiffs cannot state a claim against TUS.

The control exception to *Illinois Brick* and the Ninth Circuit's holding in *Royal Printing* do not set forth an affirmative theory of liability pursuant to which a middleman can be sued for claims arising out of an alleged antitrust conspiracy. They only provide that purchasers from the middleman can bring an action against the alleged conspirator manufacturers. Viewed in this proper light, neither the control exception in *Illinois Brick* nor *Royal Printing* supports a claim against TUS.

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1 The facts in *Royal Printing* support the contention that it does not provide that the  
 2 middleman can be sued for claims arising out of an antitrust conspiracy. In that case, only the  
 3 manufacturers alleged to have conspired were sued, and plaintiffs were seeking to recover for their  
 4 purchases from the wholesaling divisions or wholly-owned subsidiaries of those manufacturers.  
 5 *Royal Printing*, 621 F.2d at 324. The plaintiffs were not, however, seeking to recover from the  
 6 middlemen themselves – the wholesaling divisions and the wholly-owned subsidiaries – only from  
 7 the alleged conspirator manufacturers.  
 8

9 Moreover, *Royal Printing* and the other cases cited by plaintiffs recognize that suits against  
 10 intermediaries, like TUS is alleged to be, are barred because allowing them to proceed would  
 11 impermissibly heighten the risk of multiple recovery and thwart the policy rationale behind *Illinois*  
 12 *Brick* and its progeny. The plaintiffs here, if at all entitled to sue as direct purchasers, would be in a  
 13 position to recover the entire alleged overcharge by suing only the manufacturers, including CPT.  
 14 By giving Direct Plaintiffs the opportunity to sue the alleged “middleman” TUS, the risk of multiple  
 15 recovery rises to an intolerable level under *Illinois Brick*. See *Royal Printing*, 621 F. 3d at 327 n.8  
 16 (“The *Illinois Brick* Court considered and rejected the arguments that ‘it is better for the defendant to  
 17 pay sixfold or more damages than for an injured party to go uncompensated....’”). Thus, even if  
 18 Direct Plaintiffs’ allegations were deemed sufficient to treat CPT and TUS as a single entity (which  
 19 they are not), *Illinois Brick* would still bar any claim against TUS because it would create an  
 20 intolerable risk of multiple recoveries from TUS directly and from the manufacturers themselves for  
 21 the same purchases. Unraveling these transactions to determine which ones should not be double-  
 22 and triple-counted are exactly the type of complexity and speculation that *Illinois Brick* forecloses.  
 23  
 24

25 The Court’s failure to consider this argument constituted a manifest failure, under Local Rule  
 26 7-9, to consider material facts or dispositive legal arguments which were presented to the Court.  
 27 Accordingly, the Court should grant TUS’s motion for leave to file a Rule 7-9 motion.  
 28

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1                   **3. Plaintiffs' Control Argument Should Have Been Rejected Based on the**  
 2                   **Undisputed Fact that Tatung Taiwan Does Not Control TUS.**

3           This Court should have rejected plaintiffs' control argument as a matter of law based on the  
 4           undisputed fact that Tatung Taiwan did not and could not control TUS. One of plaintiffs' two  
 5           central arguments is that TUS is controlled by Tatung Taiwan because all of TUS's shares are owned  
 6           by various descendants of T.S. Lin, the now-deceased founder of Tatung Taiwan. *See Plaintiffs'*  
 7           *Supplemental Brief in Opposition to Defendant Tatung Company of America, Inc's Motion to*  
 8           *Dismiss*, p. 2. However, Plaintiffs' assertion that CPT somehow controlled TUS through Tatung  
 9           Taiwan is impossible because Tatung Taiwan itself did not and does not control TUS. In addition to  
 10          the unrefuted evidence that neither Tatung Taiwan nor CPT controlled TUS, which was presented in  
 11          the depositions of Michael Lai and Edward Chen,<sup>3</sup> the family that plaintiffs argue controls TUS (DP-  
 12          FACC ¶ 52) does not control Tatung Taiwan. This fact is the death knell for plaintiffs' control  
 13          argument. Tatung Taiwan is a public company and the family that plaintiffs argue controls TUS  
 14          owns only 4.7% of Tatung Taiwan. (*Request for Judicial Notice*, Ex. A at 31, Dkt #869).

15          Tatung Taiwan is a public company listed on the Taiwan Stock Exchange. TUS submitted a  
 16          list of Tatung Taiwan's shareholders from its Annual Report and the Court took judicial notice of  
 17          this submission. (Dkt. #869). T.S. Lin's family members hold only 4.7% of Tatung Taiwan's  
 18          shares. In addition, there are several investment funds that hold significant shareholdings in Tatung  
 19          Taiwan – shareholdings that are significantly greater than the 4.7% shareholding of T.S. Lin's  
 20          family. Finally, Tatung Taiwan, as a public company, is owned by all of its shareholders and is  
 21          governed by a duly-elected Board of Directors, like any public company. Thus, Plaintiffs' assertion  
 22          that the family of T.S. Lin controls Tatung Taiwan must be rejected based on the undisputed facts, of  
 23          which this Court has already taken judicial notice. Therefore, it follows that, since the T.S. Lin  
 24          

25          

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 26          <sup>3</sup> See Exhibits A and B to TUS's Mot. to Dismiss (Dkt #856).  
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1 family is plaintiffs' only link to Tatung Taiwan's alleged control of TUS, plaintiffs' control  
 2 argument with respect to TUS must fail. Ignoring this legal argument – based on undisputed facts –  
 3 constitutes a manifest failure by the Court to consider a dispositive legal argument under Civil Local  
 4 Rule 7-9. As such, the Court should grant TUS leave to file a motion for reconsideration of the  
 5 March 3 Order.  
 6

7 **4. Plaintiffs' Control Argument Based on Marketing Materials Should Have**  
 8 **Failed Because the Promotion Statements Do Not Justify Piercing the**  
 9 **Corporate Veil.**

10 In addition, the Court failed to address and apply the cases cited by TUS for the proposition  
 11 that the stray marketing statements that plaintiffs rely on are insufficient as a matter of law. This  
 12 was a manifest failure to consider dispositive legal arguments. Even if there were admissible  
 13 statements from TUS in its marketing materials that it was a subsidiary of Tatung Taiwan and  
 14 referring to Tatung Taiwan and CPT together, those statements are insufficient as a matter of law to  
 15 overcome the objective facts of corporate separateness between TUS, Tatung Taiwan and CPT.  
 16 There are numerous cases which hold that stray statements made in marketing materials do not  
 17 establish control, especially where, as here, there also exists evidence of a lack of corporate control  
 18 in terms of a lack of overlapping majority ownership and operational or financial control.  
 19

20 As stated above and in TUS's reply brief, even if the Court would consider the stray  
 21 statements in TUS's marketing materials with respect to Tatung Taiwan and CPT, these statements  
 22 as a matter of law are insufficient to support plaintiffs' control argument. TUS cited numerous cases  
 23 which have rejected exactly the same argument set forth by plaintiffs here. In those cases, which the  
 24 Court did not address or discuss, the courts rejected the argument that statements in marketing  
 25 materials were sufficient to support an assertion of control and to overcome the objective facts with  
 26 respect to a lack of control. Those objective facts in this case are (a) that Tatung Taiwan owns only  
 27 50% of TUS; (b) that Tatung Taiwan does not exert any financial, operational or other control over  
 28

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1 TUS; (c) that Tatung Taiwan owns only 30% of CPT; and (d) most importantly, that CPT, the  
 2 alleged conspirator manufacturer, has no ownership in TUS and exerts no financial, operational or  
 3 other control over TUS.

4 In spite of the above and overwhelming objective facts of TUS's corporate separateness,  
 5 plaintiffs make the bold claim that TUS should be party to their lawsuit because TUS "views itself as  
 6 a close and 'integrated' member of a corporate family that is controlled by Tatung Taiwan and that  
 7 includes Tatung America's 'sister' company, Chunghwa." (Pls. Supp. Brief at 4.) Plaintiffs base  
 8 this claim on ambiguous statements – culled from tens of thousands of documents released during  
 9 discovery – describing TUS as a Tatung Taiwan "subsidiary" or as a CPT "sister," or suggesting to  
 10 "potential customers" that the three companies were part of an "integrated" family. (Pls. Supp. Brief  
 11 at 5-6.)  
 12

13 However, such statements do not dissolve the corporate form or otherwise bring TUS within  
 14 the proper purview of plaintiffs' lawsuit. As at least one district court in California has recognized,  
 15 such statements do not have the power to compel participation in a lawsuit where jurisdiction is  
 16 otherwise lacking. *See Ameritec Corp. v. Ameritech Corp.*, 230 U.S.P.Q. (BNA) 225, 1986 U.S.  
 17 Dist. LEXIS 26195, \*8 (C.D. Cal. May 6, 1986). In *Ameritec*, the district court granted the  
 18 defendant's motion to dismiss for lack of personal jurisdiction despite certain advertisements and  
 19 publications referring to the "Ameritech Family of Companies" and the subsidiary's advertisements  
 20 using the pronoun "we" in reference to regional branches. *Id.* As the court explained, "[d]espite  
 21 suggestive advertisements which could be inferred to imply that the moving defendants are a unitary  
 22 business, if the operations of the corporations are kept distinct and separate, the court may decline  
 23 jurisdiction over the matter." *Id.* at \*11 (citing *Manville Boiler Co. v. Columbia Boiler Co. of*  
 24 *Pottstown*, 269 F.2d 600, 606 (4th Cir. 1959), *cert denied*, 361 U.S. 901 (1959)). The court went on  
 25 to reject the plaintiffs' alter ego theory, as plaintiffs had failed to make the requisite showing "that  
 26  
 27  
 28

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1 the corporate entities [were] set up with fraudulent intent or in bad faith.” *Id.* at \*14 (citing *Seymour*  
 2 *v. Hull & Moreland Engineering*, 605 F.2d 1105, 1111 (9th Cir. 1979)).

3 Likewise, numerous courts have consistently recognized that loose language similar to that  
 4 quoted by plaintiffs does not support piercing the corporate veil. In *Fletcher v. ATEX, Inc.*, 68 F.3d  
 5 1451, 1460 (2d Cir. 1995), the Second Circuit Court of Appeals affirmed the district court’s rejection  
 6 of the plaintiff’s argument, based on statements of corporate identity, that the veil should be pierced.  
 7 The subsidiary had “frequently” used the parent’s logo on its paperwork and packaging and had  
 8 described itself as a business unit or division of the parent in promotional literature; for its part, the  
 9 parent had, in its annual reports, characterized the subsidiary as a recent acquisition and as a  
 10 subsidiary. *Id.* Like several other courts before it, the court reasoned that corporate promotion  
 11 through a family identity is merely a form of puffery that in no way blurs the reality of corporate  
 12 distinctiveness:  
 13

14 Viewed in the light most favorable to the plaintiffs, these statements and the use of the  
 15 [parent’s] logo are not evidence that the two companies operated as a “single  
 16 economic entity.” See *Coleman v. Corning Glass Works*, 619 F. Supp. 950, 956 (W.D.N.Y.  
 17 1985) (upholding corporate form despite “loose language” in annual report about “merger”  
 18 and parent’s reference to subsidiary as a “division”), *aff’d*, 818 F.2d 874 (1987); *Japan*  
 19 *[Petrol. Co. (Nigeria), Ltd. v. Ashland Oil Co.]*, 456 F. Supp. 831, 846 (D. Del. 1978)] (noting  
 20 that representations made by parent in its annual reports that subsidiary serves as an agent  
 21 “may result from public relations motives or an attempt at simplification”); *American*  
*Trading & Prod. Corp. v. Fischbach & Moore, Inc.*, 311 F. Supp. 412, 416 (N.D. Ill. 1970)  
 (“boastful” advertising and consideration of subsidiaries as “family” do not prove that  
 corporate identities were ignored).

22 *Fletcher*, 68 F.3d at 1460-61. Later, in *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125,  
 23 130 (2d Cir. 2002), the Second Circuit rejected the plaintiff’s contention that two subsidiaries of a  
 24 common parent were agents of one another for the purposes of enforcing against both of them an  
 25 arbitration agreement signed by only one. Upholding an order of injunction issued by the district  
 26 court, the Court held that the subsidiaries were not mutual agents, even where one subsidiary had  
 27

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1 “market[ed] the services of the entire Merrill Lynch family of companies to clients; and ... the  
2 Merrill Lynch companies present[ed] to the public the image of a single, integrated firm.” *Id.*

3 Numerous U.S. district courts have likewise refused to pierce the veil on the basis of  
4 conditions like those advanced here by the plaintiffs. *See, e.g., In re Parmalat Sec. Litig.*, 375 F.  
5 Supp. 2d 278, (S.D.N.Y. 2005) (declining to deem related entities alter egos despite marketing  
6 materials indicating a “close relationship” and the existence of “overlapping executives,” as  
7 complaint did not indicate an intermingling of funds or a failure to adhere to corporate formalities);  
8 *In re Lernout & Hauspie Sec. Litig.*, 230 F. Supp. 2d 152, 170 (D. Mass. 2002) (web page suggesting  
9 that KPMG International marketed itself as a single entity could not support its being held  
10 vicariously liable for acts of KPMG UK based on apparent authority); *Total Comms. Svcs., Inc. v.*  
11 *Seiscor Technols., Inc.*, 1990 U.S. Dist. LEXIS 13337, \*15-16 (N.D. Ill. Oct. 9, 1990) (subsidiary’s  
12 use of parent Raytheon’s logo and motto “A Raytheon company” and statement by Raytheon  
13 chairman that such use was required and intended to convey “a unity of purpose and quality of  
14 business integrity that are unexcelled” could not support piercing); *In re Acushnet River & New*  
15 *Bedford Harbor*, 675 F. Supp. 22, 34-35 (D. Mass. 1987), *rev’d in part on other grounds*,  
16 *Lumbermens Mut. Cas. Co. v. Belleville Indus.*, 938 F.2d 1423 (1st Cir. 1991) (“The practice of  
17 identifying a subsidiary’s products with the name of the parent is a frequently used marketing  
18 strategy which, given the understandings of the marketplace, does not imply a disrespect for  
19 separateness.”); *Wiedemann v. Cunard Line, Ltd.*, 380 N.E.2d 932, 938-39 (App. Ct. Ill. 1978)  
20 (“[U]se of the name ‘Cunard’ by not only defendant Cunard Line Ltd. but also by other subsidiaries  
21 of the parent company for advertising purposes, while it might lead to confusion in the minds of the  
22 public as noted by the trial court, does not make Cunard liable for the torts of the other subsidiary”).  
23  
24  
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26  
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28

The wayward examples cited by plaintiffs that allegedly convey that TUS, Tatung  
Taiwan, and CPT were or considered themselves to be parts of an integrated family are no more

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1 egregious than the wide array of examples rejected in the cases cited above. Even if true and  
 2 admissible, the isolated use of the family of companies in advertising cannot justify disregarding the  
 3 corporate form for the purposes of continuing to compel TUS's participation in this lawsuit. Neither  
 4 TUS, Tatung Taiwan, nor CPT has ever denied TUS's existence as a separately incorporated entity,  
 5 and plaintiffs have not alleged an intermingling of corporate funds or a failure to adhere to corporate  
 6 formalities. Therefore, even if the Court considers and even credits the stray statements contained in  
 7 marketing materials set forth by plaintiffs, these statements, as a matter of law, are insufficient to  
 8 provide the basis for a claim against TUS.  
 9

10 The Court's failure to consider this argument constituted a manifest failure, under Local Rule  
 11 7-9, to consider material facts or dispositive legal arguments which were presented to the Court.  
 12 Accordingly, the Court should grant TUS's motion for leave to file a Rule 7-9 motion.  
 13

14 **5. The Court Should Have Resolved Factual Issues on TUS's Rule 12(b)(1)**  
 15 **Motion to Dismiss and Thus Erred in Denying TUS's Motion Due to the**  
 16 **Presence of Factual Issues.**

17 Finally, that plaintiffs have offered supposed evidence of control – their family argument and  
 18 the marketing statements, neither of which, as seen above, is sufficient, as a matter of law – does not  
 19 automatically mean that TUS's motion should have been denied because there is a factual issue.  
 20 Even if plaintiffs' supposed evidence does not fail as a matter of law to support an assertion of  
 21 control, it is proper and appropriate for the Court to resolve factual issues on a motion to dismiss  
 22 brought under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See Thornhill Publ'n Co. v.*  
 23 *General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).  
 24

25 First, as seen above, this Court should have rejected as a matter of law plaintiffs' arguments  
 26 based on alleged control of TUS by Tatung Taiwan through the T.S. Lin family and based on TUS's  
 27 marketing materials, and thus did not need to decide whether it could or could not resolve any  
 28 factual issues.

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Moreover, even if plaintiffs present supposed evidence to refute TUS's facts – and TUS submits that the supposed facts submitted by plaintiffs are insufficient as a matter of law to justify the denial of TUS's motion – the Court can and should resolve any factual disputes between TUS's submissions and plaintiffs' submissions, on TUS's 12(b)(1) motion. This is the instruction of the Ninth Circuit in *Thornhill*. In that case, the Court stated that a district judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary. 594 F.2d at 733. Thus, the Court stated, "Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary." *Id.* (citations omitted). The Court went on to distinguish the standard for a Rule 12(b)(1) motion based on a factual attack from the standard for a Rule 56 motion for summary judgment. Thus, the Court stated:

The standards applicable to a Rule 12(b)(1) speaking motion differ greatly from the standards for ruling on a motion for summary judgment. Faced with a factual attack on subject matter jurisdiction,

"the trial court may proceed as it never could under Rule 12(b)(6) or Fed. R. Civ. P. 56. ... No presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist."

*Id.* (citation omitted). Since the jurisdictional issue raised here is not intertwined with the merits, the Court should not have denied TUS's Rule 12(b)(1) motion to dismiss due to a factual dispute, and should instead have resolved the dispute. Indeed, lack of standing under *Illinois Brick* is not intertwined with the merits of plaintiffs' claim because there is no part of the consideration of *Illinois Brick*'s application that impacts an element that plaintiffs need to prove in order to prove their claim under Section 1 of the Sherman Act.

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On this point, the recent decision in *Sun Microsystems, Inc. v. Hynix Semiconductor, Inc.*, 608 F. Supp. 2d 1166 (N.D. Cal. 2009), is instructive. In that case, Judge Hamilton held that, under *Thornhill*, the proper standard to be applied to the Rule 12(b)(1) motion before her was not the Rule 56 standard, but rather the Rule 12(b)(1) standard that allowed her to make factual findings. In so holding, the Judge noted that the issue raised by the Rule 12(b)(1) motion was not so enmeshed with the substantive issues of plaintiffs' Section 1 Sherman Act claim. Thus, the Judge wrote:

[A]s applied here, *Thornhill* is best read as suggesting that the 12(b)(1) standard, rather than a Rule 56 standard, is appropriate. The jurisdictional issues in the case – while factual in nature – do not appear to be so “enmeshed” with the substantive issues of plaintiff's Sherman Act claim such as to require Rule 56 treatment. As the *Thornhill* court contemplated, the jurisdictional issue in Sun's Sherman Act and Cartwright Act claims (insofar as the foreign purchase based claims are concerned) is whether defendants' conduct had a sufficient relationship with the domestic effects of that conduct and plaintiff's injury, so as to be subject to regulations under the FTAIA. The substantive issues of plaintiff's claims, however, are whether defendants participated in anti-competitive conduct by conspiring to fix prices. Since the two issues are distinct, analysis pursuant to 12(b)(1) standards is appropriate. Accordingly, the court shall consider the factual evidence presented and resolve factual disputes as necessary to determine the existence of jurisdiction as a matter of law.

*Id.* at 1185. Based on *Thornhill* and *Sun Microsystems*, this Court should, if necessary, make factual findings that TUS was not controlled by CPT at all and in any event not to the extent necessary to establish either a single enterprise or the control exception to *Illinois Brick*.

**B. The Court Should Grant TUS Leave to File a Motion to Vacate the Denial of TUS's Motion to Dismiss and to Set the Motion for Oral Argument.**

For several reasons, the Court should grant TUS leave to file a motion to vacate the Court's denial of TUS's motion to dismiss and to set the motion for oral argument. First, concepts of fundamental fairness dictate that TUS should have the same opportunity to address the Court in oral argument as all of the other defendants had in connection with their motions. Second, as counsel for TUS stated in court on February 27, 2009, plaintiffs' supplemental submission – which the Court relied on in its March 3 Order – raised new factual materials and new arguments that TUS would only have been able to respond to in the oral argument on February 27, 2009. However, when oral

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1 argument did not take place on February 27, 2009, the oral argument set for March 6, 2009, was then  
 2 the only chance for TUS to respond to the new factual materials and new arguments raised in  
 3 plaintiffs' supplemental submission. Therefore, for these reasons, the Court should grant TUS leave  
 4 to file a motion to vacate the Court's denial of TUS's motion to dismiss and to set the motion for  
 5 oral argument.  
 6

7 First, when all of the parties appeared before the Court on February 27, 2009, to argue the  
 8 numerous motions to dismiss the First Amended Complaint, the Court announced the various  
 9 motions that it had before it but did not mention TUS's motion to dismiss. After counsel for the  
 10 defendants and the plaintiffs had given oral argument to the Court with respect to numerous motions  
 11 to dismiss, counsel for TUS raised the fact that the Court had not mentioned TUS's motion and  
 12 offered, in the interests of the Court's time that day, with a full motion calendar, to argue the case on  
 13 another day, and proposed a week later on March 6, 2009. The Court responded that it did not show  
 14 TUS's motion as being scheduled for February 27. Counsel for plaintiffs stated that it was his  
 15 understanding TUS's motion was scheduled for February 27. The Court then tentatively set TUS's  
 16 motion for oral argument for March 6. Counsel for TUS stated that oral argument was important to  
 17 TUS because plaintiffs had submitted a supplemental submission and TUS wanted to respond in oral  
 18 argument to certain new issues and facts made by plaintiffs. Finally, TUS's counsel was prepared to  
 19 argue its motion to dismiss on February 27. In light of the above, concepts of fundamental fairness  
 20 dictate that, since all of the defendants and all of the plaintiffs had the opportunity to give oral  
 21 argument on the numerous motions to dismiss on February 27, TUS should also be allowed to give  
 22 oral argument in support of its motion to dismiss.  
 23  
 24

25 Second, plaintiffs submitted a supplemental submission on February 20, 2009, in opposition  
 26 to TUS's motion to dismiss. That supplemental submission was based on the depositions of Edward  
 27 Chen and Michael Lai, taken by the plaintiffs on February 13, 2009. That supplemental submission  
 28

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1 thus raised new factual materials and new arguments that TUS did not have an opportunity to  
 2 respond to in writing prior to what it thought was going to be the oral argument on February 27,  
 3 2009. When oral argument did not occur on February 27, TUS did not get its opportunity to address  
 4 the new facts and arguments contained in plaintiffs' supplemental submission on that day, but  
 5 justifiably thought that it would have that opportunity on March 6, 2009. When the Court ruled on  
 6 TUS's motion without providing TUS with the opportunity for oral argument, TUS lost its  
 7 opportunity to address in any way the new factual materials and new arguments that plaintiffs had  
 8 made in their submission. This result, simply put, was unfair to TUS. Moreover, it put the Court in  
 9 a position where it could not possibly evaluate all the material facts and legal arguments pertinent to  
 10 TUS's motion to dismiss. Thus, the Court should vacate its denial of TUS's motion to dismiss and  
 11 set the motion for oral argument.  
 12

#### 14 IV. CONCLUSION

15 For the reasons stated above, the Court should grant TUS leave to file a motion to reconsider  
 16 the Court's March 3, 2009, order denying TUS's motion to dismiss, or, alternatively, to vacate the  
 17 March 3 Order and set TUS's motion to dismiss for oral argument.  
 18

20 Dated: February 4, 2010

**BAKER & MCKENZIE LLP**

22 By: /s/ Patrick J. Ahern

23 Patrick J. Ahern  
 24 Attorneys for Defendant  
 25 TATUNG COMPANY OF AMERICA, INC.  
 26  
 27  
 28

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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that a true and correct copy of the foregoing document was served upon the parties and counsel of record, through the Court's ECF system, on February 4, 2010.

/s/ Patrick J. Ahern  
Patrick J. Ahern  
One of the Attorneys for Defendant  
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